RECENT AMERICAN CASES.

In the Supreme Court of the United States, January, 1853.

GEORGE RUNDLE AND WILLIAM GRIFFITHS, TRUSTEES OF THE ESTATE OF JOHN SAVAGE, DECEASED, PLAINTIFFS IN ERROR, *vs.* THE DELAWARE AND RARITAN CANAL COMPANY, DEFENDANT IN ERROR.

1. By the law of Pennsylvania, the river Delaware is a public navigable river, held by its joint sovereigns in trust for the public.
2. Riparian owners in that State have no title to the river, or any right to divert its waters, unless by license from the States.
3. That such license is revocable, and in subjection to the superior right of the State to divert the water for public improvements, either by the State directly, or by a corporation created for that purpose.
4. The proviso to the provincial acts of Pennsylvania and New Jersey of 1771, does not operate as a grant of the usufruct of the waters of the river to Adam Hoops and his assigns, but only as a license or toleration of his dam.
5. As by the laws of his own State the plaintiff who claimed under Hoops, could have no remedy against a corporation authorized to take the whole waters of the river for the purpose of canals or improving the navigation, so neither can he sustain a suit against a corporation created by New Jersey for the same purpose, who have taken part of the waters.
6. The plaintiffs being but tenants at sufferance in the usufruct of the water to the two States who use the river as tenants in common, are not in a condition to question the relative rights of either to use its waters without consent of the other.
7. This case is not intended to decide whether a first licensee for private emolument can support an action against a later licensee of either sovereign or both, who, for private purposes, diverts the water to the injury of the first.

This was a writ of error to the Circuit Court of the United States, for the District of New Jersey. The opinion of the Court was delivered by

GRIER, J.—The plaintiffs in error, who were plaintiffs below, are owners of certain mills in Pennsylvania, opposite to the City of Trenton, in New Jersey. These mills are supplied with water from the Delaware River by means of a dam, extending from the Penn-

sylvania shore to an island lying near and parallel to it, and extending along the rapids to the head of tide water.

The plaintiffs, in their declaration, show title to the property under one Adam Hoops, who had erected his mill, and built a dam in the river, previous to the year 1771. In that year, the provinces of Pennsylvania and New Jersey respectively passed acts declaring the river Delaware a common highway, for purposes of navigation up and down the same, and mutually appointing commissioners to improve the navigation thereof, with full power and authority to remove any obstructions whatsoever, natural or artificial, and subjecting to fine and imprisonment any person, who should set up, repair, or maintain any dam or obstruction in the same. *Provided*, "That nothing herein contained shall give any power or authority to the commissioners herein appointed, or any of them, to remove, throw down, lower, impair, or in any manner to alter, a mill dam erected by Adam Hoops, Esq., in the said river Delaware, between his plantation and an island in the said river, nearly opposite to Trenton; or any mill dam erected by any other person, or persons, in the said river, before the passing of this act, nor to obstruct, or in any manner to hinder the said Adam Hoops, or such other person or persons, his or their heirs and assigns, from maintaining, *raising*, or repairing the said dams respectively, or from taking water out of the said river, for the use of the said mills and waterworks erected as aforesaid, and *none other*."

The declaration avers that, by these acts of the provincial legislatures, the said Hoops, his heirs and assigns, became entitled to the free and uninterrupted enjoyment and privilege of the river Delaware, for the use of the said mills, &c., without diminution or alteration by or from the act of said provinces, now States of Pennsylvania and New Jersey, or any person or persons claiming under them, or either of them. Nevertheless, that the defendants erected a dam in said river above plaintiffs' mills, and dug a canal, and diverted the water to the great injury, &c.

The defendants are a corporation chartered by New Jersey, for the purpose of "constructing a canal from the waters of the Delaware to those of the Raritan, and of improving the navigation of

said rivers." They admit the construction of the canal, and the diversion of the waters of the river for that purpose, but demur to the declaration, and set forth as causes of demurrer:

"That the act of the legislature of the then Province of Pennsylvania, passed March ninth, in the year of our Lord one thousand seven hundred and seventy-one, and the act of the then Province of New Jersey, passed December twenty-first, in the year of our Lord one thousand seven hundred and seventy-one, as set forth in said amended fifth count, do not vest in the said Adam Hoops, or in his heirs or assigns, the right and privilege to the use of the water of the river Delaware, without diminution or alteration by or from the act of the then Province, now State of Pennsylvania, or of the then Province, now State of New Jersey, or of any person or persons claiming under either of them, or of any person or persons whomsoever, as averred in the said amended fifth count of the said declaration. And also for that it does not appear, from the said amended fifth count, that the same George Rundle and William Griffiths are entitled to the right and privilege to the use of the water of the river Delaware, in manner and form as they have averred, in the said amended fifth count of their declaration.

"And also that as it appears, from the said amended fifth count, that the river Delaware is a common highway and public navigable river, over which the States of Pennsylvania and New Jersey have concurrent jurisdiction, and a boundary of said States, these defendants insist that the legislative acts of the then Provinces of Pennsylvania and New Jersey, passed in the year of our Lord seventeen hundred and seventy-one, as set forth in the said amended fifth count, were intended to declare the said river Delaware a common highway, and for improving the navigation thereof, and that the provision therein contained, as to the mill dam erected by Adam Hoops, in the said river Delaware, did not, and does not amount to a grant or conveyance of water power to the said Adam Hoops, his heirs or assigns, or to a surrender of the public right in the waters of the said river, but to a permission only to obstruct the waters of the said river by the said dam, without being subjected to the penalties of nuisance; that the right of the said Adam Hoops

was, and that of his assigns is, subordinate to the public right, at the pleasure of the legislature of Pennsylvania and New Jersey, or either of them."

On this demurrer, the Court below gave judgment for the defendants, which is now alleged as error.

It is evident that the extent of the plaintiffs' rights as a riparian owner, and the question whether this proviso operates as the grant of a usufruct of the waters of the river, or only as a license or toleration of a nuisance, liable to revocation, or subordinate to the paramount public right, must depend on the laws and customs of Pennsylvania, as expounded by her own Courts. It will be proper, therefore, to give a brief sketch of the public history of the river, and the legislative action connected with it, as also of the principles of law affecting aquatic rights, as developed and established by the Courts of that State.

The river Delaware is the well known boundary between the States of Pennsylvania and New Jersey. Below tide water, the river, its soil and islands, formerly belonged to the Crown; above tide water, it was vested in the proprietaries of the co-terminous provinces, each holding *ad medium filum aquæ*. Since the Revolution the States have succeeded to the public rights, both of the Crown and the Proprietaries. Immediately after the Revolution, these States entered into the compact of 1783, declaring the Delaware a common highway for the use of both, and ascertaining their respective jurisdiction over the same. For thirty years after this compact, they appear to have enjoyed their common property without dispute or collision. When the legislature of either State passed an act affecting it, they requested and obtained the concurrence and consent of the other. Their first dispute was caused by an act of New Jersey, passed February 4, 1815, authorizing Coxe and others to erect a wing dam, and divert the water for the purpose of mills and other machinery. The consent of the State of Pennsylvania was not requested; it therefore called forth a protest from the legislature of that State. This was followed by further remonstrance in the following year. A proposition was made to submit the question of their respective rights to the Supreme Court of the

United States, which was rejected by New Jersey. After numerous messages and remonstrances between the Governors and legislatures, commissioners were mutually appointed to compromise the disputes, but they failed to bring the matter to an amicable conclusion. The dispute was never settled, and the wing dam remained in the river.

In 1824, New Jersey passed the first act for the incorporation of the Delaware and Raritan Canal Company, for which the Company gave a bonus of $100,000. This act requires the consent of the State of Pennsylvania; and, on application being made to her legislature, she clogged her consent into so many conditions, that New Jersey refused to accept her terms, returned the bonus to the Company, and so the matter ended for that time.

Both parties then appointed commissioners, to effect, if possible, some compact, or arrangement, by which each State should be authorized to divert so much water, as would be necessary for these contemplated canals. After protracted negotiations, these commissioners finally (in 1834) agreed upon terms, but the compact proposed by them was never ratified by either party.

In the meantime, each State appropriated to itself as much of the waters of the river as suited its purpose. In 1827 and 1828, Pennsylvania diverted the river Lehigh, a confluent of the river Delaware, and afterwards, finding that stream insufficient, took additional feeders for her canal out of the main stream of the Delaware. On the 4th February, 1830, the legislature of New Jersey passed the act under which the defendants are incorporated, and in pursuance of which they have constructed the dam and feeder the subject of the present suit.

The canals in both States, supplied by the river, are intimately and extensively connected with their trade, revenues, and general property, while the navigation of the river above tide water, and the rapids at Trenton, is of comparatively trifling importance, being used, only at times of the spring freshets, for floating timber down the stream, when the artificial diversions do not affect the navigation. The practical benefits resulting to both parties, from their great public improvements, appear to have convinced them that

further nogotiations, complaints, or remonstrances would be useless and unreasonable, and thus, by mutual acquiescence and tacit consent, the necessity of a more formal compact has been superseded.

The law of Pennsylvania, by which the title and rights of the plaintiffs must be tested, differs materially from that of England, and most of the other States of the Union. As regards her large fresh water rivers, she has adopted the principles of the civil law. In the case of *Carson* vs. *Blazer*, the Supreme Court of that State decided that the large rivers, such as the Susquehanna and Delaware, were never deemed subject to the doctrines of the common law of England, and applicable to fresh water streams, but that they are to be treated as navigable rivers; that the grants of William Penn, the proprietary, never extended beyond the margin of the river, which belonged to the public, and that the riparian owners have, therefore, no exclusive rights to the soil or water of such rivers *ad filum medium aquæ*.

In *Shrunk* vs. *The Schuylkill Navigation Company*, the same &ourt repeated thk same doctrine, and &hief Justice Tilghman, in delivering the opinion of the Court, observes, "Care seems to have been taken, from the beginning, to preserve the waters of these rivers for public uses, both of fishery and navigation; and the wisdom of that policy is now more striking than ever, from the great improvements in navigation, and others in contemplation, to effect which it is necessary to obstruct the flow of the water in some places, and in others to divert its course. It is true that the State would have had a right to do these things for the public benefit, even if the rivers had been private property; but then compensation must have been made to the owners, the amount of which might have been so enormous, as to have frustrated, or at least checked, these noble undertakings."

In the case of *The Monongahela Navigation Company* vs. *Coons*, the defendant had erected his mill under a license, given by an act of the Legislature (in 1803) to riparian owners, to erect dams of a particular structure, "provided they did not impede the navigation," &c. The Monongahela Navigation Company, in pursuance of a charter granted them by the State, had erected a dam in the Mo-

nongahela, which flowed back the water on the plaintiff's mill, in the Youghogany, and greatly injured it. And it was adjudged by the Court, that the Company were not liable for the consequential injury thus inflicted. The Court, speaking of the rights of plaintiff consequent on the license granted by the act (of 1803,) observed, "That statute gave riparian owners liberty to erect dams of a particular structure, on navigable streams, without being indictable for a nuisance; and their exercise of it was, consequently, to be attended with expense and labor. But was this liberty to be perpetual, and for ever tie up the power of the State? Or is not the contrary to be inferred from the nature of the license? So far was the Legislature from seeming to abate one jot of the State's control, that it barely agreed not to prefer an indictment for a nuisance, except on the report of viewers to the Quarter Sessions. But the remission of a penalty is not a charter, and alleged grant was nothing more than a mitigation of the penal law."

The case of *The Susquehanna Canal Company* vs. *Wright* confirms the preceding views, and decides "that the State is never presumed to have parted with one of its franchises, in the absence of conclusive proof of such an intention. Hence a license, accorded by a public law to a riparian owner, to erect a dam on the Susquehanna River, and conduct the water upon his land for his own private purposes, is subject to any future provision which the State may make with regard to the navigation of the river. And if the State authorize a company to construct a canal, which impairs the rights of such riparian owner, he is not entitled to recover damages from the company. In that case Wright had erected valuable mills, under a license granted to him by the legislature; but the Court says, "He was bound to know that the State had power to revoke its license, whenever the paramount interests of the public should require it. And, in this respect, a grant by a public agent of limited powers, and bound not to throw away the interests confided to it, is different from a grant by an individual, who is master of the subject. To revoke the latter, after an expenditure in the prosecution of it, would be a fraud. But he who accepts a license from the legislature, knowing that he is dealing with an agent,

bound by duty not to impair public rights, does so at his risk; and a voluntary expenditure on the foot of it gives him no claim to compensation."

The principles asserted and established by these cases are, perhaps, somewhat peculiar; but, as they affect rights to real property in the State of Pennsylvania, they must be treated as binding precedents in this Court. It is clear, also, from the application of these principles to the construction of the proviso under consideration, that it cannot be construed as a grant of the waters of a public river for private use, or a fee simple estate in the usufruct of them, "without diminution or alteration." It contains no direct words of grant, which would operate by way of estoppel upon the grantor. The dam of Adam Hoops was a nuisance when it was made, but as it did little injury to the navigation, the commissioners, who were commanded to prostrate other nuisances, were enjoined to tolerate this. The mills of Hoops had not been erected on the faith of a legislative license, as in the cases we have quoted, and a total revocation of it would not be chargeable with the apparent hardship and injustice, which might be imputed to it in those cases. His dam continues to be tolerated, and the license of diverting the water to his mills is still enjoyed, subject to occasional diminution from the exercise of the superior right of the sovereign. His interest in the water may be said to resemble a right of common, which, by custom, is subservient to the right of the lord of the soil; so that the lord may dig clay pits, or empower others to do so, without leaving sufficient herbage on the common. *Bateson* vs. *Green*, 5 T. R. 411.

Nor can the plaintiff claim by prescription against the public for more than the act confers on him, which is at best impunity for a nuisance. His license, or rather toleration, gives him a good title to keep up his dam, and use the waters of the river, as against every one but the sovereign, and those diverting them by public authority for public uses.

It is true that the plaintiffs' declaration in this case alleges that the waters diverted by defendants dam and canal, are used for the purpose of mills, and for private emolument. But as it is not alleged or pretended that defendants have taken more water than

was necessary for the canal, or have constructed a canal of greater dimensions than they were authorized and obliged by the charter to make, this secondary use must be considered as merely incidental to the main object of their charter. We do not, therefore, consider the question before us, whether the plaintiff might not recover damages against an individual or private corporation diverting the water of this river to their injury, for the purpose of private emolument only, with or without license or authority of either of its sovereign owners. The case before us requires us only to decide that, by the laws of Pennsylvania, the river Delaware is a public navigable river, held by its joint sovereigns in trust for the public; that riparian owners of the land have no title to the river, or any right to divert its waters, unless by license from the State. That such license is revocable, and in subjection to the superior right of the State to divert the water for public improvements.

It follows necessarily from these conclusions, that whether the State of Pennsylvania claim the whole river, or acknowledge the State of New Jersey as a tenant in common, and possessing equal rights with herself, and whether either State, without consent of the other, has, or has not, a right to divert the stream, it will not alter or enlarge the plaintiff's rights. Being a mere tenant at sufferance to both, as regards the usufruct of the water, he is not in a condition to question the relative rights of his superiors. If Pennsylvania chooses to acquiesce in this partition of the waters for great public improvements, or is estopped to complain by her own acts, the plaintiff cannot complain, or call upon this Court to decide questions between the two States, which neither of them sees fit to raise. By the law of his own State the plaintiff has no remedy against a corporation authorized to take the whole river for the purpose of canals, or improving the navigation; and his tenure and rights are the same as regards both the States.

With these views, it will be unnecessary to inquire whether the compact of 1783, between Pennsylvania and New Jersey, operated as a revocation of the license or toleration implied from the proviso of the colonial acts of 1771, as that question can arise only in case the plaintiff's dam be indicted as a public nuisance.

Nor is it necessary to pass any opinion on the question of the respective rights of either of these co-terminous States, to whom this river belongs, to divert its waters, without the consent of the other.

The question raised is not without its difficulties; but, being bound to resolve it by the peculiar laws of Pennsylvania, as interpreted by her own Courts, we cannot say that the Court below has erred in its exposition of them; and, therefore, affirm the judgment.

In the Supreme Court of the United States, February, 1853.

ASPDEN *vs.* ASPDEN.

The Supreme Court will not order the re-argument of a case once decided, on motion of Counsel, but only where some one of the majority of the Court expresses a doubt and desires a re-argument. It makes no difference that the decision of affirmance was by a divided Court.

This case went up on appeal from the Circuit Court for the Eastern District of Pennsylvania, was argued in May, 1851, and held under advisement during the following vacation. On the 14th of December, 1852, the decree of the Circuit Court was affirmed, but the Supreme Court declined giving any opinion, at length, upon the points involved, as the affirmance was the result of an equal division of the Judges. The next day after this decree, a special order of the Court was made, directing a mandate to issue to the Circuit Court, certifying the affirmance of its decree by the Supreme Court.

Under these circumstances, a printed petition was filed on the 25th of February, 1853, *by Messrs. Wm. B. Reed, Thos. A. Budd, H. J. Williams, J. Randall and Wm. Rawle*, asking a rehearing upon behalf of a portion of the former appellants, being the English claimants *a parte paterna*.

The petition, after setting forth the facts, argued[1] that the prayer was justified by the uniform practice of the High Court of Chan-

[1] The Court did not listen to arguments, and the following points and authorities are reported from briefs prepared on both sides, and which would have been used had the Court consented to hear argument on the motion. It is thought that they may be useful to the profession.—*Eds.*

cery in England, which allows a rehearing as a matter of course, upon the certificate of counsel, and which practice had been adopted by this Court by a rule promulgated in 1791. 2 Mad. Ch. Pr. 483. 2 Smith's Ch. Pr., 26 to 36. 2 Chit. Gen. Prac. 585 to 604. *Galton* vs. *Hancock*, 2 Atk. 439. 3 Dan. Ch. Pr. 1603 to 1622, 1649–50. Blake's Ch. Pr. 165 *Baxton* vs. *Wilson*, 2 Atk. 152. *Moor* vs. *Moor*, 1 Dick, 66.

II. That the practice of the House of Lords, if different from this, is no guide for this Court, because, before a cause can reach that tribunal, it has been so fully investigated by the inferior courts, that in case of an equal division, the decision below may be safely allowed to remain unreversed. Ram. on Leg. Judg., 9 Law Lib., p. 123, sec. 5, also p. (18.)

III. The issuing of a mandate under an erroneous impression of its propriety, and which mandate still remains unexecuted, can interpose no obstacle to a rehearing.

IV. The organization of the Court with an unequal number of judges, was intended by Congress to avoid the necessity of affirmances upon an equal division.

V. Till the close of the term at which a decree is pronounced, the whole case must remain in the breast of the Court, and in all cases where a rehearing has been refused, it has been asked for after the close of the term in which the decree was pronounced. [Citing all the cases of refusal which will be found below in argument of Appellees.]

VI. In the United States Courts a decree is held to be enrolled as of the term in which it is pronounced, and in construction of law, a term is but a single day. Story's Pl. 320–1, sec. 403. Jacob's Law Dic. Cunningham's Law Dic. Burns' Law Dic., Title *Term*.

On behalf of the appellees, it was argued by Messrs. *W. A. Jackson, J. L. Newbold and J. M. Read,*

I. That it is the settled practice of this Court never to rehear a cause, after it has been transmitted to the Court below to carry into effect the decree of this Court. *Browder* vs. *M'Arthur*, 7 Wheat. 58; *Ex parte Sibbald* vs. *The United States*, 12 Pet. 492; *Martin* vs. *Hunter's Lessee*, 1 Wheat. 304; *Himeley* vs. *Rose*, 5 Cranch,

313; *Skillern* vs. *May*, 6 Cranch. 267; *Hudson* vs. *Gustier*, 7 Cranch. 1; *Scott* vs. *Blaine*, 1 Bald. 287; *Jackson* vs. *Ashton*, 10 Pet. 480; *Chaires* vs. *The United States*, 3 How. 611.

II. That this principle has never been departed from, except in cases of a "mere clerical error," or where the judgment has been surreptitiously or irregularly obtained. *Bank of Kentucky* vs. *Wister*, 3 Pet. 431; *Ex parte Anderson. Crenshaw*, 15 Pet. 119.

III. That the fact of the Court being equally divided, can make no difference as to the conclusiveness of the affirmance upon the rights of the parties. *The Antelope*, 10 Wheat. 66, 126; *Etting* vs. *Bank of the United States*, 11 Wheat. 59, 77; *Washington Bridge Co.* vs. *Stewart*, 3 How. 413, 424; 1 Chitty's Archbold, 384, 376; Macqueen's Prac. House of Lords, 27; *Thornley* vs. *Fleetwood*, 1 Strange, 318; *Deighton* vs. *Greenville*, 1 Show. 35.

IV. That the practice of the High Court of Chancery is inapplicable, because this Court has never adopted that practice, except where they have none of their own; and the present has been shown not to be such a case. But, even if referred to, the practice of Chancery is entirely inconsistent with the prayer of the petitioner, since a rehearing is never granted there after the decree has been once enrolled, and the case brought before an appellate tribunal; 2 Dan. Ch. Pr. 1220, Perk. Ed. 3 Dan. 1615–1620, 1602.

What is commonly called an appeal to the Lord Chancellor, is in reality, nothing but a re-hearing, and can only be granted before enrollment. Law Rev. Nov. 1852, p. 153; 2 Dan. Ch. Pr. 1228; 2 Chit. Gen. Pr. 601; *Dimes* vs. *Grand Junction Canal*, 19 Law Times R. 317, (June 1852.)

That a decree is enrolled, by the English practice, as soon as it becomes a record in the cause, and is pleadable between the parties; and the decree, in the present case, having been remitted to the Court below, and being there recorded, being final in its nature, and pleadable as such between the same parties, must be considered as having been strictly and technically enrolled, so far as our practice permits.

V. That the jurisdiction of this Court being an appellate one, is

strictly analogous to the appellate jurisdiction of the Lords, and that such a prayer as this would, in the House of Lords, be treated as a "mere irregularity." Macqueen's Treatise on the Appellate Jurisdiction of the House of Lords, p. 447, 436, 443. *Tommey* vs. *White*, 3 Clark's House of Lords' Cases, 68; *Bright* vs. *Hutton*, 3 Clark's House of Lords' Cases, 341; Macqueen's Pr. 438.

They also cited Stat. 14 and 15 Vict. Ch. 83, Sec. 9, Ab. of Stat. 20 Law Jour. R. *In re Clark*, 21 Law Jour. R. Ch. p. 20; *Turner* vs. *Turner*, 19 Law Times R. 15; *Seagrave* vs. *Pope*, 16 Jur. 1099; *Blair* vs. *Bell*, 16 Jur. 1103.

On the 28th of February, the opinion of the Court refusing the motion, was delivered by C. J. TANEY, as follows:

"In the case of *Aspden* vs. *Aspden*, the Court have considered the application for a re-hearing made upon Friday last. I am instructed to say in regard to it, what has been repeatedly said upon similar motions, both at the present and at former terms. The Court have established it as their practice, that where a case has once been argued and decided, they will not consent to rehear it, unless one of the Judges, who concurred with the majority, should find that he had committed an error, and should wish for an opportunity of reviewing his decision. In the present case, upon account of the importance of the questions involved, the Court not only listened to a prolonged argument, but, having considered it during the last term, thought proper, under the operation of a curia advisari vult, to hold it under advisement during the vacation. When, therefore, the decree was affirmed, it was understood that each member of the Court had definitely made up his mind, and was not likely to alter it. Since then we have seen no reason to change our opinions.

"It may be proper to say a few words in regard to the practice of granting rehearings in England, which has been relied upon in support of the motion. The analogy is not correct. The English Courts of Chancery which allow this, are exercising an original, not an appellate jurisdiction. It is true that a first rehearing may there be claimed as almost of right upon the application of counsel, and the cause is sometimes prolonged to a third and fourth hearing. But

these are exclusively in Courts of original jurisdiction, and are therefore, technically speaking, re-arguments rather than re-hearings.

"But, even independently of this distinction, we think the English practice has very little to recommend it. The expenses of litigation, thus prolonged, are oppressive and often ruinous to suitors, and have thrown reproach upon the whole system of Chancery jurisprudence. It would ill become this Court to introduce into their practice a tedious and costly system, which the most eminent of the law reformers in England are, at this very time, doing their utmost to rid themselves of. We cannot afford to employ one term in re-hearing cases which have been decided at a previous term. The motion is therefore over-ruled."

Rhode Island Supreme Court, March, 1852.

MOUNT VERNON BANK *vs.* CHARLES M. STONE.[1]

Where a bill makes charges of fraud which are not established at the hearing, the bill will be dismissed, notwithstanding it states other grounds upon which relief might have been granted, if not blended with the allegations of fraud.

The Mount Vernon Bank was a bank located in Foster, and the defendant was from the 8th of June, 1844, to the 29th of May, 1850, their agent for the purpose of transacting the business of the Bank in the City of Providence, where the plaintiffs provided him with an office and books, to be kept in the office in which to record the business of his agency, and they paid him as such agent, a salary of five hundred dollars per annum. The bill alleged first, that the defendant had not fully accounted and had refused to deliver and exhibit the books of the bank to the plaintiffs, and in the second place, charged that the defendant fraudulently concealed the said books, fraudulently used the money of the bank, and by fraudulent representations obtained a release or discharge of a portion of said account, and a surrender of the bond given for the faithful discharge of his duties as agent. The bill prayed for a decree for an account, a delivery of the books of the bank, a sur-

[1] This case will be found in 2 R. I. Rep. 129, printed, but not yet published. We are indebted to Thomas Durfee, Esq., the State Reporter, for the printed sheets of his forthcoming volume.

render of the release obtained from the plaintiffs, and a return of the bond.

The opinion of the Court was delivered by

GREENE, C. J.—The bill in this case alleges the appointment of the defendant as agent of the plaintiffs, and states the business which he was to transact in that capacity. It alleges the purchase of books by the defendant, in which to record the business of his agency, and that such books were paid for by the defendant with the moneys of the plaintiff, and that the books are the property of the plaintiffs. The bill then alleges that the defendant has refused to deliver or exhibit to the plaintiffs, the said books of account, and that defendant has used the money and other property, and credit of the plaintiffs, while acting as such agent, by loaning the same and otherwise, and received therefor divers sums of money, for which he has not fully accounted to the plaintiffs.

The bill then charges as follows, viz:—"That the said Stone fraudulently conceals said books of account from the plaintiffs, and hath removed the same from the office and place of business of said agency founded as aforesaid by the plaintiffs; and that said Stone had received large sums of money belonging to the plaintiffs, and fraudulently retained portions of the same and appropriated the same to his own use and benefit, and that the said Stone in the accounts he has rendered the plaintiffs from time to time, hath made fraudulent representations of his conduct and proceedings, to wit:—among others, that he hath represented that he hath received smaller sums of money for interest, than he did in fact receive as such agent, and by means of such false and fraudulent representations, hath deceived the officers and the agents of the plaintiffs, and hath obtained from them a certain release and discharge of a portion of said account, and surrender of a bond executed by said Stone, for the faithful discharge of the duties of said agency."

The bill, among other things, prays that the defendant may be decreed to surrender and cancel the release and discharge by him, held from the plaintiffs, and to return the bond executed by him and his sureties, for the faithful discharge of his duties in his said agency.

After a careful examination of the evidence in relation to the charges of fraud, we feel bound to say, that the plaintiffs, in our judgment, have failed to prove them; and the only question which remains to be considered in the cause, is, whether the bill ought to be dismissed or sent to a master for an account, with the liberty to the plaintiffs to prove an error or mistake in the settlement which has heretofore been made, and with receipt or release given, and executed by them, and also to prove any matters of claim not embraced by said settlement. This would be the ordinary course of the Court on a bill, by the principal against his factor for an account. The difficulty in pursuing this course in the present case, arises from the charges of fraud contained in the bill.

We think these charges the principal ground of relief set forth in the bill, and we cannot permit the plaintiffs, after having failed to prove the fraud, to fall back on the allegation, that the defendant has not accounted, and has not produced and delivered his books of account, and to treat the case as if no allegation of fraud was made. The rule in relation to this subject is stated by the Court in the case of *Price* v. *Berrington*, (7 Eng. L. & Eq. R. 260.) "When the bill sets up a case of actual fraud, and makes that the ground of the prayer for relief, the plaintiff is not entitled to a decree, by establishing some one or more of the facts quite independent of fraud, but which might, of themselves, create a case under a totally distinct head of equity from that which would be applicable to the case of fraud originally stated." And the same principal is recognized in *Farraly* v. *Hobson*, (22 Eng. Ch. R. 255,) and in *Glaseat* v. *Lang*, (Ibid, 301.)

We think the rule is founded in the highest justice. A plaintiff ought not to be permitted, considering that a Court of Chancery is always open to allegations of fraud, to speculate upon the chances of relief upon that ground, and failing in that, to fall back upon a different ground.

Bill dismissed with costs, without prejudice, except as to the charges of the fraud.

NOTE.—In the subsequent case of Masterstone *vs.* Finnegan the same rule was applied by the same Court. This was a bill in equity for partition of a lot of land,

of small value, in the suburbs of the City of Providence. The parties were both ignorant and illiterate, and had taken their joint deed of the lot to a person, and requested him to write a division of it for them to execute. He wrote a very informal memorandum to this effect upon the back of the deed, and they signed it; but this division did not describe the whole lot, and so a part was left undivided. The plaintiff filed her bill to set aside this partition as being imperfect, informal, and insufficient in law, and as injurious to her, because it left a part of the lot undivided, and of this part the defendant had taken exclusive possession of, and claimed it as his own. This the plaintiff denied, and stated in her bill that the above memorandum of division was obtained from her by fraud and imposition of the defendant, as she could not read nor write: and she prayed the Court to set aside the partial partition, and order a new and valid one of the whole lot. The Court were not convinced of the fraud and imposition upon the evidence, nor that the defendant had any exclusive title to the undivided portion of this lot; and consequently dismissed the plaintiff's bill as to setting aside the imperfect partition, (and in fact held that to be valid,) with costs, because the charge of fraud was not proved, and on the authority of the above case of M. V. Bank *vs.* Stone. But they sustained the bill as to the portion of the lot not embraced in the parol partition; but the plaintiff's misfortune in this regard is, that this portion is but nineteen feet wide, and the same degree unfortunately confirms the defendant in his portion under the parol partition, which chances to lie between the plaintiff's portion and the new strip to be assigned to her nine and a half feet wide. What she *sought* was, to have a new and proper partition of the whole upon any of the grounds of her bill. But from the remarks which fell orally from the Chief Justice, in the case of Whitman *vs.* Holden, &c., at the same term, it would seem the rule established in the two preceding cases is not to be rigidly applied to all cases, but it must depend much on the circumstances of the case at bar; and the Court was understood so far to qualify the preceding cases, as to intimate that the charge of fraud must be gross or wanton, and appear to be made from bad motives, in order to preclude the party making it, from relief on other grounds alleged and sustained in the same bill.—*Reporter's Note.*

Supreme Court of Pennsylvania, December Term, 1852.

DAVID MEKONKEY'S APPEAL.

1. Where one devises all his real estate for life, and all his personal estate absolutely, "having full confidence that his wife will leave the surplus to be divided at her decease justly among her children," the words do not of themselves import a trust, nor will they be so construed without other expressions to control them.
2. Words in a will expressive of desire, recommendation, and confidence, are not words of technical, but of common parlance, and are not *prima facie* sufficient to convert a devise or bequest into a trust; and the old Roman and English rule on this subject is not a part of the common law of Pennsylvania.

3. Such words may amount to a declaration of trust when it appears from other parts of the will, that the testator intended not to commit the estate to the devisee or legatee, or the ultimate disposal of it to his kindness, justice or discretion.

This was an appeal from the decree of the Orphans' Court of Chester County. The Supreme Court had already had the matter twice before them, in the cases referred to in the opinion. The litigation had lasted many years, and the paper books and reports, etc., were voluminous; but it is only necessary to state two of the propositions of the many, made by the appellant's counsel for an understanding of the judge's opinion, which proceeded upon a construction of the words of the will.

Isaac Pennock died in February, 1824, leaving a Will dated Jan. 1, 1824, and a codicil without date, both proved April 5, 1824. In this Will he made a bequest to his wife, in the words quoted in the opinion.

For the appellant, *Messrs. P. J. Smith and H. J. Williams.*

For the appellees, *Messrs. J. J. Lewis and J. M. Read.*

For the appellant it was contended,—1st, That the children of Isaac Pennock having, during the life of his widow, Martha Pennock, acquiesced in her claim of ownership of his personal estate, having permitted her to treat it and dispose of it as her own, having accepted gifts from her of the identical property, and also other gifts and benefits both in her life and by her Will, on the basis of the property being her own, they are estopped from setting up a claim.

And the council cited, 1 Greenleaf on Ev., §§ 22, 26, 211, 237; 1 Sugd. on Pow., 576, 2 Id., 170; *Carr* vs. *Wallace,* 7 Watts, 400.

2d. The extent of the obligation imposed by the third clause of Isaac Pennock's Will on his wife, Martha Pennock, was that she should by will divide the surplus of his personal estate amongst his children, in such proportions as accorded with her notions of justice, and that the language of the Will did not raise a trust.

And the counsel cited *Wright* vs. *Atkyns,* 1 Ves. & Bea. 313; 2 Roper on Legacies, 301; *Brown* vs. *Stiggs,* 4 Ves. 711; *Forbes*

vs. *Ball*, 3 Merr. 437; 1 Sugd. on Pow. 394; *Marborough* vs. *Godolphin*, 2 Ves. Sr. 60; *Butcher* vs. *Butcher*, 9 Ves. 397; *Boyle* vs. *Peterborough*, 1 Ves. Jun. 310; *Lysaghl* vs. *Royse*, 2 Sch. & Lef. 154; *Vanderzlee* vs. *Acklon*, 4 Ves. Jun. 785; *Kemp* vs *Kemp*, 5 Ves. 859; *Spencer* vs. *Spencer*, Id. 368; *Macey* vs. *Shermer*, 1 Atk. 389; *Bax* vs. *Whilbread*, 1 Ves. Jun. 24; 1 Sugd. on Pow. 568; 2 Roper on Legacies, ch. 21, § 6, *Wood* vs. *Cox*, 2 My. & Cr. 684, 690; *Pope* vs. *Pope*, 10 Sim. 1; *Wynne* vs. *Hawkins*, 1 Bro. Ch. R. 179; *Pushman* vs. *Filleter*, 3 Ves. Jun. 7 Sugd. Law of Prop. 262, 2 Sto. Eq. Jur. § 1069; *Shaw* vs. *Lawless*, 5 Cl. & Fin. 159; *Knott* vs. *Colter*, 2 Phillipps Ch. Ca. 196; *Fenden* vs. *Stephens*, 3 Id. 149.

For the appellees, it was contended that the language of the Will created a trust, and that Mrs. Pennock became thereby a trustee for her children, because, 1st, the subject matter of the trust was certain; 2d, the objects of the trust certain; and 3d, the words sufficient to raise it.

The council cited Co. Litt. 272 b, *Chudleigh's Case*, 1 Rep. 121, 1 Story's Eq. Jur. § 602; *Massey* vs. *Sherman*, Amb. 520.

They also cited, to show that precatory words created express trusts as completely as imperative words in the Roman law, whence they contended it was adopted into the English Courts, the following authorities. Gaius' Inst. § 247, 249; Just. Inst. B. 2, tit. 24, § 3; Cooper's Just. 186; 2 Domat, B. 3, tit. 1, § 4; Id. § 8, Art. 47, p. 82; Id. B. 4, tit. 2, § 1, Art. 2, 3, p. 141–2; Id. B. 5, p. 211, 225, 233; 2 Colquhoun's Summ. Rom. Civ. Law, § 1148, p. 165; Bowyer's Com. on Mod. Civ. Law, C. 25, p. 150; 1 Spence Eq. Jur. 438; 2 Id. p. 5.

To the same effect they cited *Wright* vs. *Atkyns*, 17 Ves. 255, 19 Ves. 299, Coop. Ch. Cas. 111, S. C., Sugd. Law of Prop. 376, S. C.; *Meredith* vs. *Heneage*, 10 Price, 230; *Harding* vs. *Glyn*, 1 Atkyn, 469, 2 Wh. & Tud. Eq. Cas. 686, S. C.; *Huskisson* vs. *Budge*, 20 Law Jour. Rep. N. S. 209, 3 Eng. L. & Eq. Cases, 180, S. C.; *Briggs* vs. *Penny*, 16 Jur. 93, 8 L. & Eq. Rep. 231, S. C.; *Wade* vs. *Mallard*, 16 Jur. 492; *Constable* vs. *Bull*, 3 De Gex. & Smale, 411, 20 Law Times, 60 S. C.

The opinion of the Court was delivered by

LOWRIE, J.—This case has already been twice before this Court, and the action of the Court on those occasions is reported in Coates' Appeal, 2 P. S. R. 129, and in Mekonkey's Appeal, 13 Id. 253. In both those instances, the will of Isaac Pennock has undergone the construction of this Court, in so far as relates to the rights here in controversy; and now, when the cause comes on for final determination, we are asked by the appellants to hear them again on their rights, under that will, before the door of justice is forever shut against them.

We have, therefore, heard and re-heard, before a full court, the argument which the parties have thought proper to present on the original question, partly because we could not say that the question was conclusively settled by an interlocutory order, and partly because it is impossible to deny that there is an irreconcilable discrepancy in the two opinions and orders, heretofore announced in this very cause. We have given to the question a very careful consideration, and are now prepared to pronounce the judgment, which is, in our opinion, demanded by the law.

For the purpose of introducing this question in its general aspect, we need to state no more than that Isaac Pennock devised to his wife Martha all his real estate for life, and all his personal estate "absolutely, having full confidence that she will leave the surplus to be divided, at her decease, justly among my children." The mother is now dead, and the children claim that the bequest of the personal estate was a trust for their benefit, and have filed their petition against their mother's executor for an account. The argument in support of the petition is, that the words which I have quoted from the will are of a technical character, and do of themselves, import a trust, and that such is here the proper construction of them, unless there are other expressions controlling them, and showing a contrary intent.

Certainly, the principles of equity are part of our common law. It is the very essence of common or customary law, that it consists of those principles and forms which grow out of the customs and habits of the people. It is, therefore, involved in its very nature,

that only so much of the English law, as is adapted to our circumstances and customs, is properly recognized as part of our common law. This same principle is most emphatically involved in the cardinal maxim of all common law, *cessante ratione legis, cessat et ipsa lex.*

The technical effect, insisted upon as belonging to the words already quoted, having never received a judicial sanction in this State, until the first opening of this cause, and no rights having ever been finally decided according to it, the question is still fairly open for consideration, whether, under our law, those words have any such technical character. It is, of course, a consideration of some weight, that, besides our provincial existence, with many laws and institutions peculiar to ourselves, we have existed as an independent State for three-quarters of a century, without learning that such words have any technical meaning by our law, or are to be construed differently from words of common parlance.

It is unquestionable that such modes of expression were formerly used in the Roman and in the English law in order to create a trust, and it was founded on good reason; but if that reason had passed away before the settlement of this country, then the rule which depended upon it was not imported as part of the law which we brought from the mother country. That it remains of any force in England after the reason of it has ceased, is not surprising; for it is a common fate of institutions to outlive the causes which gave rise to them, and thus, very often, the form survives the principle which it was designed to express.

It is acknowledged that the rule by which a trust is raised out of such words, was imported into the English from the Roman law. Its origin, therefore, in the Roman law, is a relevant subject of inquiry; for if we find it arising then, not from the ordinary meanings of the words, but under the constraint of circumstances which have no existence here, the force of the Roman rule will be much impaired, if not destroyed. If, under their law, words of common parlance acquired a technical value by reason of a peculiar institution; then that technical value depends upon circumstances, and ceases with them, and the common meaning alone remains. To

construe such words, after that, as technical, is, in almost all cases, to pervert the true meaning of the words, unless other parts of the instrument clearly show that they are technically used.

It was part of the Roman law that the heir or devisee accepting the estate of a decedent became at once charged with the payment of all his debts, whether the estate was sufficient to discharge them or not. Hence, and by way of compensation, he was not bound to pay any of the legacies bequeathed by the testator; but this matter was left by the law entirely to his discretion.—It was of the essence of a Roman will, that the devisee should be universal successor to the property and debts of the decedent. He was in form and substance what we call executor and sole devisee and legatee, with the additional qualification that he (or they, for many might be joined) was bound personally for the debts, if he accepted the devise.

It is plain how restricted was the right of devise under such a law. When all the testator's bequests could be defeated at the pleasure of the devisee or instituted heir, he had no alternative but to use words of confidence, recommendation or entreaty, as to any legacies or special devises, and such words would be much more likely to be regarded than the clearest imperative words.

Moreover, there were great and peculiar difficulties in making a valid will at all under the Roman law, owing to the excessive strictness and complexity of the formalities required, and hence it was usual to add a codicil, in which the testator entreated his heir at law, if the will should not stand, to make the desired dispositions, or to hold the property for the benefit of the persons named in the codicil. Here, again, words of entreaty are much more appropriate than imperative words. Under the circumstances they clearly proved an intention to impose a duty on the general devisee as far as was possible, and not merely to entrust him with a discretion. He intended a legacy; it was the law that made it discretionary in disregard even of imperative words.

It is very plain that such an institution is at war with moral principle, and it could not exist long without giving rise to many aggravated cases of breach of such trusts, that would call loudly on the law to interfere with the discretion of the heir or devisee, and

enforce the clear intention of the testator. Hence arose an alteration of the law, and the prætors were required to enforce trusts that were created in this form. Under such circumstances the new rule was a proper one; for it enforced the very duty imposed by the testator, in the best form in which he was allowed to express it. No doubt the law continued after the reason of it had ceased; but then it contravened the intention of the testator by enforcing, as a binding obligation, what had been entrusted to the discretion of the heir or devisee. These matters are fully illustrated in Domat, 2, 3, 1; 1 Spence Eq., Jurisd. 435; and in the Corpus Juris Civ. Inst. 2, 20 and 25; Dig. 28, 1 and 29; 7 and 30; 31 and 32; Code 6, 23 and 36.

Very similar was the origin of such trusts in England. The power of devise existed among the Anglo-Saxons to its fullest extent; and hence we might expect to find no such trusts among them, and it is said that no Anglo-Saxon Will has been found containing the appointment of an executor charged with trusts. 1 Spence, Eq. Jur. 23, quoting Hickes Dissert. 37. But after the Norman conquest, and under the strict principles of feuds, devises of lands were not allowed. Hence the frequent resort to conveyances in trust, in order to be able to make provision for younger children, and for other purposes. These trusts were at first of no binding obligation, but depended for their execution entirely upon the honor of the grantee, and it was therefore very natural and appropriate that words of recommendation, desire, entreaty and confidence should be used. Dishonesty would, of course, often occasion enormous grievances arising out of breaches of such confidence. It was very easy then for an English Chancellor to bring in the Roman law to correct such evils. It was really enforcing what was intended to be a trust, and changing the law to do it. It was equity stepping in to correct the deficiencies of common law institutions, and modifying them into accordance with the changing customs and circumstances of the people. The rule thus properly introduced has, of course, outlived the circumstances which gave it birth, and which alone ought to maintain it.

But the rule is fading away even in England. The disrelish with which it is received by the legal and judicial minds of that country may be seen in the doctrine of extreme certainty required as to the subject and object of the recommendation. *Wright* vs. *Atkyns*, Turner & Russell, 157; *Ex parte Payne*, 2 Younge & Col. 646; *Tibbetts* vs. *Tibbetts*, id. 664; *Harlan* vs. *Trigg*, 1 Bro. C. C. 142; and in the fact that it is degraded into the class of implied or constructive, and not express trusts; Lewin on Trusts, 66; Jeremy, 99; 2 Rop. Leg. 380, &c.; 2 Story Eq. s. 1074; 1 Atk. 619; and that it is everywhere regarded as frustrating the will of the testator. 1 Simon's R. 540, 551; 1 Ves. & B. 315; 2 Story Eq., § 5, 1069–74.

Such words are not now regarded in England as creating a trust, unless, on the whole, they ought to be construed as imperative. 2 Spence Eq. Jur. 65; 1 Bro. P. C. 481; 2 Ves. Jr. 632. And the rule is treated as a mere artificial one that is to be strictly limited to the demands of authority. It looks upon the words as *prima facie* words of trust; 7 Sim. 665; 2 Ves. Jr. 335, 533; yet any words or expressions are eagerly seized hold of as indications of a contrary intent. 1 Sim. 550, 552; 15 id. 33, 300; 3 Beav. 172; 5 Cl. & Finn. 147, 153; 1 Bro. C. C. 143; 2 My. & K. 144.

Where it is apparent that the kindness or justice or discretion of the devisee is relied on, no trust arises. 9 Sim. 319; 10 id. 1; 5 Mad. 434; 3 Beav. 154, 172, 176; 2 You. & Col. N. S. 582, 590; 2 Ves. Jr. 530, 533. And if it can be implied from the words that a discretion is left to withdraw any part of the subject of the devise from the object of the wish or request, or to apply it to the use of the devisee, no trust is created. 2 My. & K. 201; 10 Sim. 5; 3 Beav. 173–4; 1 Bro. C. C. 179; 2 Id. 585; 3 Ves. Jr. 7; 5 Madd. 121; 1 Sim. & S. 389; 6 Beav. 342; 2 Cox, 334. See also, 2 Spence Eq. Jur. 65, et seq.

Now it is very plain that, on the former hearing of this cause, Chief Justice Gibson regarded Mrs. Pennock as having the right to withdraw the principal as well as the interest for her own use as the absolute owner. He says, 13 Pa. State R. 258, "It is plain that she was to use not only the income of the personal estate, but the

estate itself, as if she were the untrammeled owner of it. What other meaning can be given to the word 'absolutely?' We may not strike it out, and if he meant not to give her a right to consume both principal and proceeds, he knew not what he said." And the order of reference to ascertain "the value of the surplus of the testator's personal property unconsumed at Mrs. Pennock's death," was a consequence of that opinion. But it was not a legitimate consequence, as the cases last above referred to prove; for if she might apply the principle to her own use, then there can be no trust, and the case ought to have been dismissed, not referred. How could there be a trust, in the legal sense of the word? No trust or contract that is uncertain is enforced by law; because the law would have to define it, or in other words, create it, before enforcing it. If this is a trust, it was so in the mother's life-time, and could have been enforced as such. But how compel her to hold, for the benefit of her children, that over which she had the absolute control, and which she could spend as she pleased? If she could thus use it, she was no trustee in the eyes of the law, and her representative cannot be so treated after her death.

In fact, she did act all her lifetime as if she were the absolute owner, and did convert almost the whole of the property to her own use without any one of her children complaining of any breach of trust. And it is not now the surplus, in fact, that they are seeking to recover, but they are claiming from her executor an account of their property, converted by their mother to her own use.

It cannot be denied that there is considerable discrepancy in the English decisions on this subject, and nothing less can reasonably be expected. An artificial rule like the one insisted on here, that is founded on no great principle of policy, and that sets aside, while it is professing to seek, the will of the testator, must continually be contested and must be frequently invaded. And no one can read the English decisions on this subject without suspecting that all important wills, wherein similar words are found, become the subjects of most expensive contests, and give rise to those family quarrels which are the worst and most bitter and distressing of all sorts of litigation. We may well desire that such a rule shall never con-

stitute a part of our law. It rejects the plain common sense of expressions, and it is not in human nature to submit to it without a contest.

Let us examine this will without the aid of this antiquated rule. Isaac Pennock says, "I will and bequeath unto my dear wife, Martha Pennock, the use, benefit and profits of all my real estate during her natural life, and also all my personal estate of every description, including ground-rents, bank stocks, bonds, notes, book debts, goods and chattels, absolutely, having full confidence that she will leave the surplus to be divided at her decease justly among my children."

Now, it is plain that if the words of confidence were left out, Mrs. Pennock would have taken the personal estate absolutely. What did he intend by those words of confidence? Evidently to commit all the personal property to the discretion of his wife. He expected her to use it as she pleased, and to leave what shall remain at her death "justly" among his children; but he enjoined nothing. His will was to give her the power of disposal, because he had confidence in her. He intended no interference with or guidance of her discretion; but trusted all to a mother's heart. Yet this is the intention which the law is expected to guide. And in order to enforce this demand, it is insisted that she had but a life estate in the personal property. But the testator excludes this construction, for he places the real estate "for life" in contrast with the personal estate "absolutely;" and contrasted expressions cannot be equivalent. And yet, without forcing this construction, this case is at an end, unless it be insisted that the mother took no estate at all for herself, which is too absurd to be thought of. And as to the word "surplus," it can have no other meaning than the one above given, and that given by Chief Justice Gibson in the opinion above referred to. The view here taken of the words of confidence, is further confirmed by other parts of the will, where he, with "perfect confidence" and "full confidence," entrusts his children to the kindness of their mother; here surely he was intending no legal trust. If the will of the testator was to give to his wife the property, to be disposed of at her discretion, it is not for the Court to say that she has exercised

that discretion badly; and it is impossible to say wherein, under a change of circumstances, he would have exercised it differently.

We may now add that we know of no American case wherein the antiquated English rule has been adopted, and that, as it is now regarded even in England, this case would not now be governed by it. 1 Bro. C. C. 179; 2 Id. 285; 5 Madd. 118; 6 Beav. 542; 2 Younge & Col. 590; 2 Cox, 354; 3 Ves. Jr. 7; 15 Sim. 33; 1 Id. 542; 5 Eng. L. & Eq. R. 49; see also 2 Pa. State R. 131; and herein we agree with the learned judge of the Court below.

It is not to be disputed, that these views are directly opposite to those expressed by this Court, when this cause was first heard; but we cannot help it. We are bound to decide this cause upon our present views of the law. And such changes of opinion in the progress of a cause are not at all uncommon, owing to the increase of information or the change of judicial functionaries, or both. The case of *Shaw* vs. *Lawless*, 5 Clark & Fin. 129, is an illustration of this, and it belongs to the class of cases we have been discussing. One Lord Chancellor declared it a case of trust, and a new Chancellor granted a re-hearing, and declared the reverse, and his decree was affirmed in the House of Lords. Even in the present case, the opinion first declared adopted the old English rule in all its stringency, while the second one obviously flinches from a full application of a construction so artificial and unnatural. Such vacillations are to be expected where an unusual rule comes first to be applied. It is well to declare at once, and before any wrong is consummated by our judgment, that the rule has no foundation in any of our customs or institutions, and no place in our law.

Our conclusions are—1st. Words in a will expressive of desire, recommendation and confidence are not words of technical, but of common parlance, and are not *prima facie* sufficient to convert a devise or bequest into a trust; and the old Roman and English rule on this subject is not part of the common law of Pennsylvania.

2d. Such words may amount to a declaration of trust when it appears, from other parts of the will, that the testator intended not to commit the estate to the devisee or legatee, or the ultimate disposal of it to his kindness, justice or discretion.

3d. By this will the absolute ownership of the personal property of Mr. Pennock is given to his widow, with an expression of mere expectation that she will use and dispose of it discreetly as a mother, and that no trust is created thereby.

DECREE, *January* 27, 1853.—This cause came on to be heard on an appeal from the decree of the Orphans' Court of Chester county, and was argued by counsel; and thereupon, on consideration thereof, it is ordered, adjudged and decreed that all the orders and decrees made in the said Orphans' Court and in this Court, since the appeal from the first decree of the said Orphans' Court sustaining the demurrer of the respondents, and dismissing the bill or petition of the complainants, be vacated and set aside; and that the said first decree of the said Orphans' Court be affirmed, and that the parties do severally pay their own costs.

Philadelphia Nisi Prius. February, 1853.

MARY SMITH *vs.* REBECCA KRAMER.

In the trial of a question of insanity, evidence of hereditary taint is competent to corroborate direct proof.

This action of ejectment, for two messuages in Philadelphia, came on to be tried before Mr. Justice Gibson, at the sittings at Nisi. Prius, on the 14th of February, 1853. Both parties claimed under Captain Arrowsmith, a retired mariner, who had attained a competence: the plaintiff, his sister, by descent as the last of her father's issue; the defendant, his housekeeper, as his devisee. The fact in contest was his sanity. There was no evidence of practice or imbecility; but the plaintiff's witnesses testified to acts of sudden and unprovoked passion, violence, wildness, extravagance, and eccentricity; and, in order to corroborate the inference from them, her counsel offered the deposition of Susan Arrowsmith, the widow of one of the testator's brothers, that the testator's father was insane towards the close of his life; that one of the testator's two uncles, on the father's side, was insane, and the other imbecile; that his

two aunts, on the same side, and their children, were insane; that a son of one of them is in a mad-house; and that her own husband was mentally disqualified before his death. The admission of the deposition was opposed, on the ground that the legitimate inquiry was into the state of the testator's mind, not that of another; and that it did not follow, that because the testator's father and his collateral relations were insane, that he must have been so too.

The point was elaborately argued on principle and authority by *Sheppard* and *David Paul Brown* for the plaintiff, and *G. S. Biddle* and *Pancoast* for the defendant.

GIBSON, J.—I admit the deposition without hesitation, notwithstanding the dicta of Mr. Shelford, (Treat. on Lunacy, 59,) and Mr. Chitty, (Med. Jurisp. 355,) that it is an established rule of law not to admit proof of insanity in other members of the family in civil or criminal cases. Established! When, where, and by whom? Certainly not by the House of Lords in *McAdam* vs. *Walker*, 1 Dow's Par. Ca. 148, the only case cited for it, for the question there was avowedly dodged. That high Court would not shock common sense by affirming the order of the Scotch Court of Session; nor would it gratuitously reverse it, when the decision could be safely put on another ground. The authority of a judgment appealed from, and left in dubio, cannot be very great. Sir Samuel Romilly's argument, against the evidence, was rested on the fecundity and interminableness of collateral issues; and Mr. Chitty seems to have had a glimpse of the same idea, when he said the course is to confine the evidence to the mental state of the party. But every new fact, though it open a new field of inquiry, is not collateral. It may bear directly on the fact in contest; and, where it does so, it is not in the power of the Court to shut it out. A collateral issue is such as would be raised by allowing a party to put a question to a witness on cross-examination, in regard to a fact palpably unconnected with the cause, in order to afford an opportunity to discredit him by contradicting him; but does not proof of hereditary madness bear directly on the condition of the mind, which is the subject of investigation? What if the point had been ruled by the Chancellor and law judges in the House of Lords? Profoundly

learned in the maxims of the law, they were profoundly ignorant of the lights of physiology; yet, free from the presumptuousness of which ignorance is the foster-father, they refused to rush on the decision of a question to which they felt themselves incompetent. Mr. Chitty fancifully puts the solution of questions of insanity on the doctrine of legal presumptions. "As the imputation," he says, "is contrary to the natural presumption of adequate intellect, the deficit should be established by *direct* and *positive* evidence, and not merely by conjectural or probable proof." If that be law, a question of insanity is the only one in which positive evidence is required, and circumstantial evidence to corroborate is rejected. Why is evidence of an old grudge admitted against a prisoner, as a remote proof of malice, if the remote proof of hereditary insanity may not be given by him to rebut it; and why should the presumption of sanity be allowed to overbear the presumption of innocence, the strongest of them all? I admit that hereditary insanity will not itself make out a case for or against a member of the family; but to say that it may not corroborate what Mr. Chitty calls direct and positive proof, without defining it, staggers all belief. In a measuring cast, it ought to prevail. He says harsh conduct, bursts of passion, or displays of unnatural feeling, will not, *of themselves*, establish insanity. Be it so. But because the springs of such actions are concealed, are they never to be laid bare, and shown to be seated in the blood? When it is admitted by Mr. Chitty and Mr. Shelford themselves, that insanity is a descendible quality, they give up the argument. There can be nothing unreasonable in referring wild, furious, and unnatural actions, not otherwise accounted for, to the aberrations of a mind, the reflex of that of a crazy father. Mr. Taylor, a distinguished lecturer on Medical Jurisprudence in Guy's Hospital, London, says that, "in making a diagnosis of a case of insanity, the first question put is commonly in reference to the present or past existence of the disorder in other members of the family. There can be no doubt, from the concurrent testimony of many writers on insanity, that a disposition to the disease is frequently transmitted from parent to child, through many generations. M. Esquirol has remarked, that this hereditary

taint is the most common of all the causes to which insanity can be referred." (Taylor on Med. Jurisp. 502.) M. Esquirol was, in 1838, and perhaps is still, the principal physician of the hospital for the insane at Charenton, in France, and a member of the Royal Academy of Medicine at Paris. His tables of insanity are held in high repute by not only the physicians of France, but of Europe. Well might Mr. Taylor say that these things ought to be borne in mind by medical jurists. The knowledge attained by men, of a subject with which they have grappled all their lives, ought surely to prevail against knowledge gleaned from the hornbooks of a profession to which the gleaners did not belong. Strange that a source of information, open to every one else, should be closed to those who are to pass on the fact. Every man has observed that there are families, through which insanity has been handed down for generations; and why should the probability of hereditary madness be excluded, when probabilities in other cases are weighed; especially when it is known that a proclivity to theft, intemperance, lying, cheating, and almost all other moral vices are as transmissible as gout, consumption, deafness, blindness, and almost all other constitutional diseases? It is supposed by the million that insanity is a disease of the mind, not of the body. Ridiculous. If it were, it could never be cured; for the mind cannot take physic, or be separately treated; yet the statistics of the insane exhibit a great number of cures; and the time is fast coming when insanity will be considered the most manageable disease that flesh is heir to.

An objection to an inquisition which does not disclose the specific nature of the ancestor's infirmity might stand in a different light; but testimony which brings the fact of madness home to him ought to be received like evidence of family likeness, which, though less reliable, was allowed to be corroborative proof of paternity in the Douglass Peerage Case in 1767, and again in the Townsend Peerage Case in 1843. Lord Mansfield said in the former, that he had always considered likeness as an argument of a child being the son of a parent; that a man may survey ten thousand people before he sees two faces exactly alike, and that, in an army of a hundred thousand men, every man may be known from an-

other; that if there should be a likeness in feature, there may be a difference in the voice, gesture, or other characters; whereas family likeness runs generally through all of these; for that in everything there is a resemblance, as of feature, voice, attitude, and action. Might he not have added the diathesis of the brain? He doubtless might, if the point had been mooted. In prosecutions for bastardy, the practice in the Quarter Sessions was, in my day, not exactly to give the child in evidence, but to put it before the jury, sometimes by the prosecutor, and sometimes by the putative father. But ancestral irregularity in the action of the brain is more frequently transmitted than any resemblance in form or feature; and it is difficult to imagine an objection to evidence of it for purposes of corroboration.

The defendant excepted to the foregoing ruling; but examined witnesses who had been in familiar intercourse with the testator during many years without having observed anything strange or eccentric in his conduct; and the jury, having been out fifty hours, declared they never could agree; whereupon they were discharged.

Philadelphia Common Pleas. February, 1853.

BOROUGH OF FRANKFORD ET AL. *vs.* LENNIG.

1. The Board of Wardens of the Port of Philadelphia, under the acts of 1803 and 1818, have jurisdiction to authorize the construction of wharves, &c., in the river Delaware, as far north as the mouth of Frankford Creek.
2. But the Board has no jurisdiction out of the tide-way of the river, and cannot authorize such constructions in the creek itself.
3. The Board of Wardens cannot confer any right on the owners of land bordering on the river to encroach upon its channel, so as to create a *purpresture*, or public nuisance.
4. The owners of land in Pennsylvania, bordering on a navigable river, have not the right of soil to the centre of the stream. They have, however, the right to erect wharves or buildings to ordinary low water mark; and this right, in the port of Philadelphia, is not, it seems, dependent on the license of the Board of Wardens.

5. A gradual alteration of the channel of a navigable stream will control the rights of the owners of adjacent land to erect wharves therein.

6. A Court of Equity will not interfere by injunction in the case of a public nuisance where there exists any doubt of the character or legality of the act complained of, but will leave the parties to an indictment, or direct an issue.

The facts of this case appear in the opinion of the Court, which was delivered by

ALLISON, J.—The complainants in the bill filed are the Council and inhabitants of the Borough of Frankford, in the County of Philadelphia, and Amos Thorp, Albert G. Roland, Nathan Hillis, and James Brooks;—they complain that the respondent has interfered with and obstructed the navigation of the Frankford Creek; first, by a wharf constructed in the year 1843, along the south bank, and, as they assert, at one or more points into the channel of the stream; and by a continuation of said wharf now, or at the time the bill was filed, in progress of construction, of the additional length of 635 feet, which, with a pier 30 feet long by 50 feet in breadth, built at the eastern termination of the wharf, in five feet water at low tide, and in the mouth of the Creek, makes the new construction 665 feet in length from the eastern end of the old wharf.

The complainants further charge that about one-third of the extension is carried, in part, into the bed or channel of the Creek beyond low water mark, and crosses it in an oblique northeasterly direction from its southern towards its northern bank or shore, leaving, at the mouth of the stream, a channel of but 15 feet in width between the upper end of the pier and the flats on the northernmost side of the stream.

It is also stated that the Borough of Frankford was incorporated March 17th, 1800; that Frankford Creek, which forms part of the boundary of said Borough, from its mouth to the land opposite the race bridge across the Bristol Road, or Main street, in Frankford, by an act passed the 16th day of January, 1799, was declared to be a public highway of the width of 66 feet, and that Amos Thorp, A. G. Roland, Nathan Hillis, and James Brooks, citizens of Frankford, have used said creek as a public highway;

that some of them are the owners of valuable real estate, mills and wharf property, fronting on said stream or Tacony Creek, above the bridge, and that a number of the citizens of said borough have, for a long time past, and are now carrying on manufactures of various kinds, and other varieties of business, all of which depend, as well as the value of the property of complainants and others, on the unobstructed navigation of the creek, and communication thereby with the river Delaware.

The bill prays for an injunction to restrain the completion of the wharves, the use or maintenance of the same by respondent, and that he be prohibited from, in any way, lessening the channel of Frankford Creek, or interfering with the free navigation of the same.

The defendant, in his affidavit, alleges that the extension of his wharf and pier have been constructed under a license granted to himself and Frederick Lennig, who constitute the firm of Nicholas Lennig & Co., by the Wardens of the Port of Philadelphia.

Respondent denies that either of the said wharves are, or will be, an obstruction to the navigation of the creek; that his only object has been to deepen its channel, and thereby improve its navigation. He also says that the wharf built in 1843 does not encroach upon the channel of the stream, and that the mouth of the creek had been deteriorating for a number of years, by deposits of mud, especially on its northern shore; that, by the wharf last built, the channel will be deepened, by preventing the spread of the water over the flats upon the lower side, where it empties into the Delaware; that it will not only not interfere with the action of the tidal current in entering the creek, but improve it, and that he has removed the deposits of mud from the channel at the outlet, greatly to its advantage.

The affidavit of defendant further states, that in 1843, when the first wharves were built, the current of the creek at the mouth was to the north of the pier and wharf now being built, which, at that time was dry flat at low water.

Several grave questions arise in the determination of this issue; the first in importance, as it affects not only the controversy in

hand, but other interests of vast magnitude, is the protection claimed by the respondent, under the license issued by the Wardens of the Port of Philadelphia, bearing date the 6th day of December, A. D. 1852, which authorizes "Nicholas Lennig and Company, of Bridesburg, Philadelphia County, to erect a pier or wharf in the river Delaware, at the mouth of Frankford creek, not to exceed 30 feet long and 50 feet broad, in accordance with the following described lines and boundaries, to wit: commencing on a line with the piles, as driven along the south side of said creek, at the distance of 635 feet from the east end of his wharf on said creek, as per plan on file in this office," &c. The act establishing the Board of Wardens for the Port of Philadelphia, was passed the 29th day of March, 1803. The Board consisted of one Master and six Assistant Wardens, four of whom were required to be inhabitants of the City of Philadelphia, one of the Northern Liberties, and one of the District of Southwark.

The 12th section of the act provides, "that when and so often as any person shall be desirous to extend any wharf, or other building of the nature of a wharf, or cause any such wharf or building to be made in the tide-way of the river Delaware, from any part of the City or *Liberties* of Philadelphia, such persons shall make application to the Board of Wardens," &c. The only other act defining in terms the authority of the Wardens, as applicable to this part of the case, is the supplemental law of February 7th, 1818, which differs from the act of 1803, principally, in expressing, with more minuteness, the extent of their territorial jurisdiction, embracing the City of Philadelphia, the Northern Liberties, the District of Southwark, and Sand Bar Island in front of the City. It is becoming important, therefore, to ascertain what was intended by the Legislature, by the terms *Liberties* and *Northern Liberties*, as used in the connection in which they stand.

By the conditions or concessions agreed upon in England, on the 11th of July, 1681, between William Penn and the purchasers of land in the province, the proprietary was to lay out a large town or city, in the proportion of 200 acres of land for every 10,000 acres bought from him; and each purchaser became entiled to 10

acres in the city for every 500 acres thus acquired; this plan was found to be impracticable, and a compromise was agreed upon. Penn directed a survey of over 16,000 acres, which lay to the north, west and south of the city, for the use and benefit of the first adventurers, and were designated the *Liberties*, or liberty lands of Philadelphia. Under the new system, original purchasers of 500 acres became entitled to 490 acres in the county, and 10 acres of liberty land on the west, or 3 acres on the east of the Schuylkill, and a city lot embracing about one-third of an acre.

The original survey of these lands was lost at an early period, and in 1703, a warrant was issued for a re-survey of all the lands within said Liberties, and the manor of Springetsbery, according to their original lines of survey, or the present boundaries of the several tracts possessed by the settlers therein. An ancient plan of the Northern Liberties, including the manor of Springetsbery, supposed to be a return to said survey, is endorsed. This belongs to the Surveyor General's office, Northern Liberties. From these historical facts, it is evident that the terms incorporated in the acts of 1803 and 1818 had, at a very early day, a well determined signification, coeval in their origin with the birth of the colony, and, like the colony itself, undergoing in later years a material alteration; nor does it detract from the force of the argument, that the original boundaries of the liberty lands are involved in some degree of obscurity; for the best lights to which access can now be had, Holmes' Map of 1687, and Reed's Map, with explanations, published in 1774, after tracing their boundaries, as beginning on Vine street, then up the river Delaware to the mouth of Coachquenawque, or Pegg's Run, they then receded from the Delaware, to avoid the lands at Hartsfelder; now the incorporated District of the Northern Liberties, embracing 350 acres, and located six years before Penn's colony came out under a patent from Governor Andros; and also the settlement at Shackamaxon, now Kensington; whether they again touched the Delaware is a matter of some doubt; but it is certain they extended north to the Frankford Creek, below the junction of the Tacony and Wingohocking, and covered the whole of the territory westward, afterwards known

as the Northern Liberties, and subsequently as the township of the Unincorporated Northern Liberties, a term which was applied to the Delaware front north of the City, including the lands of Hartsfelder, and others not embraced in the original survey of the liberty land to the mouth of Frankford Creek, and westward to the Schuylkill River.

As early as 1768, the Provincial Assembly passed an act for raising, by lottery, £1000, for purchasing a public landing in the Northern Liberties.

Then follow a series of legislative acts, establishing, beyond controversy, the meaning of the term as applicable to the Delaware front above the City, some of which may be referred to in the following order:

First, the act of 30th, 1791, empowering the inhabitants of that part of the township, between Fourth Street and the Delaware, and Vine Street and Pegg's Run, to make regulations for lighting, &c.

March 28th, 1803.—An act was passed incorporating "The Commissioners and Inhabitants of that part of the township of the Northern Liberties, lying between the west side of Sixth Street and the river Delaware, and between Vine Street and Cohocksink Creek."

The act of March 16th, 1819, changing the name of the incorporated district to its present title, and its western boundary to the middle of Sixth street. The first section of the act of March 6th, 1820, incorporates "The Commissioners and Inhabitants of the Kensington District of the Northern Liberties." Richmond District, February 27th, 1842, was carved out of the "Township of the Unincorporated Northern Liberties." And latest in order is the act of April 1st, 1848, which provides "that the inhabitants of that part of the township of the Unincorporated Northern Liberties, in the County of Philadelphia, known as the Village of Bridesburg, be and the same is hereby erected into a borough, &c. Beginning at the junction of Frankford Creek and the river Delaware," &c.; covering the very point in controversy. The recital of these acts of Assembly is, we think, a conclusive answer to the

argument so strenuously pressed against the right of the Wardens to exercise their functions beyond the limits of the incorporated District of the Northern Liberties, or Cohocksink Creek, where it empties into the Delaware.

But, although free from doubt upon the question of the jurisdiction of the Wardens, as far north as the mouth of Frankford Creek, it is equally clear that the respondent has exceeded the privilege granted by the license, for the Wardens have authorized nothing more than a right to build a wharf or pier, 30 by 50 feet, in the river Delaware, commencing 635 feet from the old wharf: we look in vain to the license for a grant to build the connecting wharf in the mouth of the Creek, or Delaware river below low water mark, a distance, perhaps, of 200 feet. To low water mark the respondent is owner of the soil, and has a right to build of his own motion. In Pennsylvania, the land covered at high and bare at low tide, belongs to the owner of the adjacent soil. *Frestang* vs. *Powell*, 1 Wharton, 528; *Jones* vs. *Janney*, 8 W. & S. 443; *Naglee* vs. *Ingersoll*, 7 Barr, 201. And he has a right, in a port town within this limit, to erect a wharf for his own convenience or profit.

The public have, however, an easement over this space, until rescued by the owner, and appropriated to his own use; for, when covered with water, it is a part of the river, and any one can navigate, fish, pass or repass over it at high tide. Flats have always been considered an appurtenance to an adjoining river front, and pass by a conveyance of the fast land, unless expressly excluded; but, being part of the navigable bed of the river at high water, the State has always claimed to control its use, as part of the common highway; but this does not appear to be the case with us, for the act of 1803, first directing a license to be obtained for building a wharf in the tide-way of the Delaware, afterwards, in prescribing its penalty, says, if any person shall build, &c., *below low water mark, &c.* The act of 1818, it is true, contains no such qualification, but Judge Bell, delivering the opinion of the Court in *Naglee* vs. *Ingersoll*, gives this construction to that act, and says, the failure to recognize the owner's right to build his wharf to low water mark, without the permission of the Wardens, was, perhaps,

an inadvertance, and then holds that "to low water mark he might build of his own mere motion; further than that his violation was dependent upon, and to be governed by, the discretion of others, whom the lord of the soil has intrusted with jurisdiction over the subject."

The act of April 15th, 1850, expressly limits the authority of the Wardens to beyond low water mark; it provides that the 5th section of the act of February 4th, 1846, "shall not be construed to diminish the powers and authorities of the Board of Wardens, relating to the extension of wharves *beyond low water mark*, into the tide-way of the Delaware, as conferred by the act of February 7th, 1818."

And, in further support of this view of the law, might be cited the analogous act of 20th March, 1805, conferring on the Wardens like power to regulate the wharf lines upon the river Schuylkill, from the lower falls of the Delaware, *beyond common low water mark.*

For two-thirds of the construction then between the pier and old wharf, it was altogether unnecessary for the respondent, under any view of the case, to ask as a right, of others that which belonged exclusively to himself; and, it is clear, that between these points no license was attempted to be granted by the Wardens; it would even seem the respondent so understood it, from the fact of the piles, along the south side of the creek, having been driven by him, before the warrant now set up as his protection was obtained.

The erection of the connecting wharf therefore, so far as it extends into the bed of the river below low water, is clearly a *purpresture*, an encroachment and intrusion on the soil belonging to the State; or an effort to appropriate to defendant's individual advantage, a benefit common to the entire community.

The rivers of Pennsylvania are not subject to the common law rule, that owners on the banks have the right of soil to the middle of the stream, and the building of a wharf, without a license from the State, or those to whom it has delegated its authority, into the Delaware, beyond low water mark, is a clear encroachment upon the rights of the public, constituting, as it does, a permanent occupation, without license, of a part of a great public highway.

It may be a question, as to whether the obstruction to the navigation west of the pier is in fact in the river proper, or confined to the creek alone. If the latter, then it is a nuisance beyond all question, extending as it does into and obliquely across the navigable channel of a highway, which the public are entitled to enjoy free from all *let* or hindrance; the permission of the wardens could confer no right to encroach upon the channel of the creek, their jurisdiction extending to the tide-way of the river only, as it now stands. No one can doubt, who examines the premises, that the width of the channel is materially abridged, and although the depth of the waters may be increased by their confinement, as the defendant asserts in his affidavit, yet he cannot, without the sanction of law, be permitted to appropriate to himself that which belongs to the State, or is a privilege, the enjoyment of which is free and unrestricted, upon the ground of alleged improvement; for it is the highway as established by law, which the public have the right to use, and as this wharf crosses what is admitted to have been a navigable part of the stream or outlet of the creek, it is an unauthorized interference with that right.

Nor will the defence set up in the affidavit avail, that the former mouth of the creek was to the north of its present outlet, for it is not denied, that whatever change has taken place has been a gradual one; and it is well settled that the channel follows alterations thus effected; though it would be different if the change had been caused by the sudden action of the water, resulting from flood or an *obstruction* placed in the stream, 3 Kent Com., sect. 428; *Ball* v. *Slack*, 2 Wharton, 541. But where the change is an insensible one, and the stream, so to speak, selects its own course, the rights of parties are controlled by, and follow such alterations.

The question, however, as to whether the pier constructed under a license emanating from legal authority is, or is not a nuisance, remains yet to be passed upon; and the affidavits presented by both sides, conflicting and contradictory as they are in the highest possible degree, call for the intervention of another tribunal to determine this question.

As a general rule, Courts of Equity will not interfere where a doubt exists as to the character and illegality of an act complained of, until they have been ascertained by a jury, *Attorney General* v. *Cleaver*, 18 Ves. 218. If a jury should find the pier to be such an obstruction to the navigation as to amount to a nuisance, the authority under which it has been built, would not avail to prevent its abatement. The wardens cannot license a nuisance, they cannot close up or seriously impede or obstruct the navigation of a stream declared to be a public highway; no such authority is conferred upon them. As well might it be contended, that a supervisor of roads or streets could improve one highway by blocking up the entrance to another; but for the reason already assigned, we shall turn the parties over to an indictment, or an issue in the Common Pleas, for the purpose of ascertaining whether the pier is or is not a nuisance; and in consequence of the lapse of ten years intervening since the first erection, during which period the complainants may fairly be presumed to have been aware of the alleged wrong, the same disposition is made of this part of the case.

In relation, however, to so much of the new wharf as extends into the channel of the creek, or river Delaware—erected, as we take it to be, without authority of any kind to justify it, and therefore contrary to law; which is prejudicial to the interests of the community and the rights of individuals, an injunction is awarded to restrain its use, occupation or enjoyment by the respondent, or those acting under his authority. This is a much stronger case than *Commonwealth* v. *Rush*, 2 Harris, 189, in which a special and subsequently a perpetual injunction was granted to restrain defendant building upon a part of a public square, in the city of Pittsburg, which had been sold out in lots by the corporate authorities. And the nuisance is a more obvious one, because more extensive than that for which an injunction was awarded in *Commissioners* v. *Long*, 1 Parsons, 143.

The two cases just cited, and *Jordon* v. *R. R. Comp.*, 3 Wharton, 512, establish the damage arising from an obstruction of this kind, to be that which is designated irreparable injury, for which an action at law affords no sufficient remedy.

Upon the questions raised upon the argument, it is sufficient to say we are of opinion—

First. The complainants are proper parties to the bill, and entitled to a standing in Court.

Second. The complainants were not bound to appeal from the decision of the Wardens, and are not therefore concluded by it; the acts of 1803 and 1818, providing that when a license shall be refused, the applicant may appeal. Other parties are not brought within its provisions.

Third. A license to Nicholas Lennig & Co., Nicholas Lennig being dead, Charles and Frederick Lennig, remaining members of the firm surviving, and continuing the business under the old firm designation, and the property belonging to the old firm, is a sufficient authority to the respondent to erect the pier designated in the license.

In the Supreme Court of Tennessee.

BELL *vs.* THE STATE.[1]

1. The utterance of obscene words in public, being a gross violation of public decency and good morals, is indictable.

2. In a prosecution for the utterance of obscene language in public, it is not necessary that the words should be proven exactly as charged to have been spoken.

Bell was indicted in the Circuit Court of Blount County for the utterance of grossly obscene language, "in public and in the hearing of divers citizens," the character and precise nature of which are indicated by the opinion. At the September term, 1850, LUCKEY, Judge, presiding, there was a verdict of guilty, and judgment accordingly, and an appeal in error.

John R. Nelson for Bell. An indictment for words spoken, where the words themselves constitute and are the gist of the

[1] This case will be found reported 1 Swan's Tenn. Rep. 42, now about issuing from the press. We are indebted to the kindness of the reporter for the sheets.

offence, except for blasphemy, is without precedent, and cannot be maintained.

But if it can be, the same strictness of proof as to the words used is required, as in cases of libel: Whar. Cr. L. 88. The words spoken must be set out exactly as spoken, and cannot be charged according to their substance, and the words so charged, or words of precisely the same meaning, without the help of any implication or intendment, must be proven.

Attorney General for the State.

The opinion of the Court was delivered by

McKinney, J.—The plaintiff in error was indicted and convicted in the Circuit Court of Blount, for the utterance of certain grossly obscene words in public, and in the hearing of divers persons, in the town of Louisville in said county. The different words alleged to have been spoken, are set forth in three different counts. This was necessary to the validity of the indictment, but we omit to repeat them here; because of their extremely vulgar and offensive character. It is sufficient to state, that they relate to acts of criminal intercourse alleged, by the defendant, to have taken place between him and the daughters of Abraham Hartsell, and to a loathsome disease, said by the defendant to have been contracted by him from the wife of Hiram Hartsell.

Two questions are presented for our determination: First, is the utterance of obscene words in public an indictable offence? And if so, secondly, are the words proved sufficient to support the charges in the indictment?

Upon the first point, the argument for the plaintiff in error rests upon the narrow and unsubstantial ground, that no precedent or adjudication has been found in support of such an indictment. Admitting this to be true, for the present, what does it establish?

If the case stated in the indictment falls within the operation of clear, well defined, and well established principles of law, is it to be urged against the maintenance of this prosecution, that no similar case has heretofore occurred calling for the like application of such principles? Surely not at this day. Are not innumerable instances to be found in the modern Reports, both of England and

America, in which the liberal, enlightened, and expansive principles of the common law have been adapted and applied to new cases, for which no precedents were to be found, so as to meet the ever varying condition and emergencies of society? And this must continue to be so, unless a stop be put to all further progress of society; and unless a stop be also put to the further workings of depraved human nature, in seeking out new inventions to evade the law.

What then are the well established principles of the common law applicable to the present case?

The distinguished commentator on the laws of England informs us, that upon the foundations of the law of nature and the law of revelation, all human laws depend, 1 Bl. Com. 42. The municipal law looks to something more than merely the protection of the lives, the liberty, and the property of the people. Regarding Christianity as part of the law of the land, it respects and protects its institutions; and assumes likewise to regulate the public morals and decency of the community. The same enlightened author (1 Vol. Com. 124) distinguishes between the absolute and relative duties of individuals, as members of society. He shows very clearly that, while human laws cannot be expected to enforce the former, their proper concern is with social and relative duties. Municipal law being intended only to regulate the conduct of men, considered under various relations, as members of civil society; hence he lays it down, that however abandoned in his principles, or vicious in his practice, a man may be, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws. But, says the learned writer, if he make his vices public, though they be such as seem principally to affect himself—as drunkenness, or the like—they then become, by the bad example they set, of pernicious effect to society; and, therefore, it is then the business of human laws to correct them. See also Bl. Com. 41, 42.

It is certainly true that, in England, many offences against good morals and public decency, if committed in private, belong properly and exclusively to the ecclesiastical courts. But it is equally true,

that whenever they become public, so as thereby to become of pernicious example, or offensive to public morals and decency, they fall within the proper jurisdiction of the temporal courts.

In the case of *The King* vs. *Delard et als.* (3 Burr. R. 1438), which was an information for conspiracy, for putting a young girl into the hands of a man of rank and fortune, for the purpose of prostitution—Lord Mansfield laid it down, that, except as to those cases appropriated to the Ecclesiastical Court, the Court of King's Bench is the *custus morum*, or guardian of the morals of the people, and has the superintendency of offences *contra bonos mores;* and upon this ground, he says, both Sedley and Curl, who had been guilty of offences against goood manners, were prosecuted in that Court.

In 1 Russel on Crimes, (270, at top,) it is said that, "In general, all open lewdness, grossly scandalous, is punishable by indictment at the common law; and, says the author, (it appears to be an established principle, that whatever openly outrages decency, and is injurious to public morals, is a misdemeanor." So Blackstone lays it down, (4 Com. 64,) that any grossly scandalous and public indecency is indictable, and punishable in the temporal courts by fine and imprisonment.

These principles have been fully recognized by this Court. In the case of *Grisham and Ligon* vs. *The State*, (2 Yerger,) that thorough common lawyer, the late Judge Whyte, declared that "The common law is the guardian of the morals of the people, and their protection against offences notoriously against public decency and good morals." And he adds, in another part of the same opinion, "we have the express authority of the common law, as declared by the judges in the courts of justice, that all offences against good morals are cognizable and punishable in the temporal courts, that are not particularly assigned to the spiritual court."

The books of reports, both of England and this country, abound with cases where, upon these principles of the common law, convictions have been enforced for various offences against public morality and decency, without the aid of any statutory enactment. And surely it can be no reason for the relaxation of these salutary prin-

ciples, but rather the contrary, that, in this country, we have no "spiritual court" to lend its aid in the suppression of the numerous offences falling within the class now under consideration; and that such of them as cannot be reached in the mode pursued in the case before us, must "go unwhipt of justice."

It would be tedious to enumerate the cases in which offences have been held indictable, as *contra bonos mores*—a few will suffice for the present purpose. Public drunkenness, 4 Bl. Com. 41. All indecent exposure of one's person to the public view, *Id.* 65, n. 25. In the case of *The King* vs. *Crunden*, 2 Camp. 89, (1 Russ. on Crimes, 302,) it was held an indictable offence to bathe in the sea near inhabited houses, from which the person might be seen; although the houses had been recently erected, and, previously thereto, it had been used for persons, in great numbers, to bathe at such place. And it was so held, for the reason "that whatever place becomes the habitation of civilized men, there the laws of decency must be enforced."

So it has been held by this Court, that if the master of a slave, in his employ, permit such slave to pass about, in view of the public, so meanly clad, as not to protect the person of such slave from indecent exposure, the master is indictable for lewdness, or scandalous public indecency: 3 Humph. R. 203. And it may be laid down, in general terms, that all such acts and conduct as are of a nature to corrupt the public morals, or to outrage the sense of public decency, are indictable, whether committed by words or acts.

These adjudications, without citing others, we think furnish analogies sufficiently strong to sustain the present prosecution. Are the outrageously vulgar and obscene words found in this record, if uttered in the ear of the public, less likely to shock any one's sense of decency, and to corrupt the morals of society—not to speak of their inevitable tendency to provoke violence and bloodshed—than the offences charged in the several adjudicated cases above cited? It does not so appear to us. But, where there is no analogy to be drawn from any decided case, we hold that, upon the broad principles of the common law, which we have stated, this prosecution is most amply sustained. Thus fortified by sound principles—princi-

ples which lie at the foundation of every well regulated community —(and resting on a basis so immutable,) we are the more indifferent as to precedents exactly in point.

Secondly. It is argued that the words charged to have been uttered, being the gist of the offence, they must be set forth with the same particularity as in an indictment for libel; or for contemptuous words spoken to a magistrate in the execution of his office; or for seditious words; and that, at least, the substance of the words, as set forth in the indictment, must be proved. Hence, it is insisted that a charge, importing that certain acts had been done by the defendant, as stated by him, will not be supported by proof that he said he would have done the acts, if opportunity had been afforded. The present case, it may be remarked, is distinguishable from either of the cases cited. The gist of the offence here, is not a specific libel upon a private individual; nor is it a specific contempt to a public functionary; neither is it for a seditious or treasonable act towards the government; in all which cases the principle relied upon unquestionably applies. The gist of this offence is the gross violation of good morals and public decency; for which, according to the argument, there is no precedent to be found; and if required, for the first time, to make one, as we hesitate not to do, we must be guided by principles sensible and practicable in themselves. If the criminality of the defendant's conduct depends alone upon the flagrant outrage to public decency, by the utterance of shamelessly obscene language in reference to certain acts, can it, in reason, be of any consequence whether such language imported that he had done, or would do, the specific acts? In either case the offence, so far as public decency is concerned, is identically the same. To hold that the words must be laid exactly as spoken, or that they must be proved as laid, would, perhaps, in most cases, insure impunity to the offender; because almost every one, not abandoned to all sense of decency, would instinctively turn away his ear from hearing such revolting indecency.

But it is needless to pursue this unpleasant discussion farther, as upon the third count the conviction may be well rested; and between the words in that count, as laid and proved, there is no variance.

Let the judgment be affirmed.